RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
AUG 4 - 2016
OFFICE OF THE CLERK

No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. The Lawyers' Committee frequently appears before the Court either representing parties or as an amicus. On criminal justice issues, the Lawyers' Committee served as counsel in *Chambers v. Mississippi*, 410 U.S. 284 (1973), where the Court found that Mr. Chambers, who had been convicted of murder, had been deprived of a fair trial. The Lawyers' Committee also helped bring *O'Shea v. Littleton*, 414 U.S. 488 (1974), which accused law enforcement officers of refusing to prosecute white residents who had committed race-based hate crimes, and instead harassed civil rights demonstrators by arresting them and charging them with crimes unwarranted by the facts.

Currently, the Lawyers' Committee works at the intersection of criminal justice and civil rights on issues such as fighting mass incarceration, ending

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

the school-to-prison pipeline, and promoting access to employment for people with criminal records. As part of this work, the Lawyers' Committee currently convenes the Civil Rights Coalition for Police Reform. The Lawyers' Committee has an interest in the present case because it raises fundamental questions about the use of explicitly race-based testimony in determining whether jurors impose a death sentence.

SUMMARY OF ARGUMENT

Throughout American history, black Americans have been subject to prejudices about their likelihood to commit crimes, with a corresponding wide variety of criminal laws that explicitly or implicitly targeted them. In America's colonial and antebellum periods, these laws often expressly differentiated between blacks and whites on the basis of race, intentionally distinguishing between presumptively innocent white Americans and enslaved blacks. Legal and extra-legal processes after the Civil War continued to treat blacks as criminal, culminating with solidification of Jim Crow laws designed to keep blacks in their subservient place.

The disparate racial treatment to which blacks have been subjected historically—buttressed by express assertions of black criminality—has created an unfortunate and inaccurate archetype of the violent black criminal. This archetype so permeates the American psyche that it subconsciously warps collective and individual perspectives regarding black Americans, a phenomenon psychologists term "implicit racial bias." Researchers have demonstrated that most Americans harbor an

implicit belief that blackness and criminality are linked, and that this link influences their decisions and behaviors—including jurors' views when making death penalty determinations. And both this Court and numerous Courts of Appeals have repeatedly recognized that unconscious, discriminatory stereotypes can play a major role in decision making.

These psychological dispositions can be brought to the fore and magnified by exposure to racially-tinged triggers, a process known as "priming." Priming reminds the human mind of its implicit associations and invites recipients to follow the well-worn paths those implicit associations have formed.

Implicit biases and priming have a particularly profound impact when invoked by an expert witness. This is because expert witnesses occupy a sensitive position in the criminal justice system, functioning as authority figures who direct a jury based on their expertise. As a result, juries are likely to obey their suggestions rather than evaluate them dispassionately.

In Mr. Buck's case, history, biases, priming, and expert credibility combined in Mr. Quijano's "expert" testimony. Building on centuries of racial prejudice, Mr. Quijano's testimony primed jurors to follow their implicit biases in finding that Mr. Buck was likely to be dangerous in the future because of his race. Because Mr. Quijano's status as an expert for the defense amplified the effect of his testimony, it is unsurprising that the jury exercised its considerable discretion consistent with his statements. This Court should hold that defense counsel's decision to introduce this unduly prejudicial testimony against

his own client, Mr. Buck, constitutes an extraordinary circumstance under Federal Rule of Civil Procedure 60(b).

ARGUMENT

I. THE HISTORICAL BACKGROUND OF THE BLACK CRIMINAL STEREOTYPE

A. Colonial and Antebellum Disabilities for Blacks

America's peculiar institution of slavery is the starting point for understanding modern views and stereotypes concerning black Americans' purported propensity to commit crime. *See generally* Ira Berlin, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (2d ed. 2000). Slavery both required and cultivated systemic penalization of blackness. Colonial and antebellum legal codes provide a tainted foundation for the stereotype of black as criminal and future generations' understandings of black criminality.

As former Third Circuit Judge A. Leon Higginbotham Jr. explained, "[d]uring the colonial and antebellum periods, one did not have to study sentencing patterns of trial judges to ascertain whether judges were imposing far more severe sentences on blacks than on whites for the same crime; most often, the legislation blatantly required more severe sentences for blacks." A. Leon Higginbotham, Jr. and Anne F. Jacobs, *The 'Law Only as an Enemy': The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1021-22 (1992) (hereafter Higginbotham). Explicitly discriminatory statutes were often justified by

stereotypes of blacks as savage and not fully human. For example, when South Carolina passed its first comprehensive slave code in 1712, its stated reason was that "the said negroes and other slaves brought unto the people of this Province . . . are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the laws, customs, and practices of this Province." A. Leon Higginbotham, Jr., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 167 (1978) (hereafter Matter of Color) (quoting 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 352 (Thomas Cooper and David J. McCord, eds.) (1836-41)).

Disparate laws were also commonly justified by stereotypes that slavery was necessary to combat blacks' inherent state as inferior, stupid beings. As one anti-abolitionist pamphleteer explained in the 1830s, it was self-evident "that the negro is constitutionally indolent, voluptuous, and prone to vice, that his mind is heavy, dull, and unambitious; that the doom that has made the African in all ages and countries, a slave—is the natural consequence of the inferiority of his character.'" Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 21 (2010) (quoting William Drayton, THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF NORTHERN ABOLITIONISTS (1836)) (hereafter Condemnation of Blackness); *see also id.* at 22-23 (referencing attempts to find biological justifications for black inferiority throughout the nineteenth century).

Stereotypes of black Americans as criminal and dangerous were further strengthened through enactment of long lists of capital crimes applicable solely to blacks. One commentator immediately prior to the Civil War estimated that Virginia had "sixty-eight crimes for which slaves might receive the death sentence as compared to only one, first-degree murder, for which whites could be put to death." Higginbotham at 1022 (citing George M. Stroud, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 77-80 (1856) (photo reprint 1968)). Georgia similarly enacted numerous capital crimes that applied only to slaves and, in some instances, free blacks or American Indians. Matter of Color at 256-57 (detailing examples); *see also id.* at 262-63 (additional capital crimes in Georgia in 1765 and 1770 statutes); *McClesky v. Kemp*, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting) (discussing Georgia capital crimes applicable only to blacks as of 1861). Other states similarly authorized death only for blacks who committed certain crimes. *See* Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 99 (Charles J. Ogletree, Jr. and Austin Sarat eds. 2006) (hereafter Traces of Slavery) (examples from Texas, Florida, Louisiana, Mississippi, South Carolina, and Tennessee).

Predictably, execution rates tracked these disparities. Some half of the blacks (but no whites) executed in Virginia between 1800 and 1860 were hanged for crimes other than murder. *Id.* In Louisiana, the number of blacks executed for crimes

other than murder was actually higher than those executed for homicides. *Id.* at 99. Again other states were similar. *Id.* at 99-100 (examples). In combination, pre-Civil War statutes and their implementation demonstrated a belief that blacks required strenuous punishment while providing frequent, visible reminders of black criminality.

Besides laws that facially treated blacks and whites differently and were indicative of perceived dangerousness, numerous procedural disadvantages also reflected a belief in black untruthfulness and criminality. For instance, a 1732 Virginia statute explained that blacks' trial testimony was limited because their "base and corrupt natures meant that their testimony cannot certainly be depended upon." Higginbotham at 995 (quoting Act of May 1732, ch. VII § V, in 4 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 327 (William W. Hening ed. 1819-23)); *see also* Matter of Color at 180-81 (South Carolina slave testimony generally only admissible if attended by independent indicia of reliability); *id.* at 282 (Pennsylvania free blacks barred from testifying against whites until 1780).

Similarly, the perception that accused blacks were guilty justified elimination of procedural protections considered vital for white defendants in many jurisdictions. As early as 1692, Virginia explained that the right to jury trial for slaves in capital cases was "unnecessary to secure substantial justice." Higginbotham at 985 (citation omitted). It instead substituted trial by local justices of the peace. *Id.* at 984-86; *see also id.* at 992 (unanimous verdicts not

even required in late 1700s); Matter of Color 179-80 (similar slave courts, South Carolina after 1712); *id.* at 257-58 (Georgia after 1755); *id.* at 281-82 (Pennsylvania from 1700 to 1780). Nor did many colonial justice systems perceive any reason to provide slaves convicted of capital crimes with appeals. Prior to 1833, for instance, judgments against slaves and free blacks in South Carolina were carried out more or less summarily. *Id.* at 180 (citing black horse thief captured on Sunday, tried on Monday, and hanged at noon on Tuesday). And the same Virginia 1692 statute that established justice of the peace slave courts also eliminated appellate rights. Higginbotham at 997-98; *see also Peter, a Slave v. Commonwealth*, 4 Va. 330, 331 (1823) (rejecting appeal of slave convicted of murder as "novel"); *but see In re Elvira, a Slave*, 57 Va. 561 (1865) (Virginia slave finally allowed appeal in last months of Civil War).

B. Black Criminality Under Jim Crow

Following the Civil War, Southern opposition to integrating former slaves and their descendents as full, equal citizens meant that society continued to impose legal and extra-legal disabilities on blacks. These legal barriers again strengthened the stereotype of black Americans as dangerous and more likely to commit crimes.

Such views received a boost as statisticians digested the 1890 federal census, a "crucial milestone" in demographic information because of improvements in data gathering techniques and the twenty-fifth anniversary of the Civil War and subsequent emancipation. Condemnation of Blackness 31. Unfortunately, influential

contemporaneous discussion of this data tended to interpret black crime as a function of racial dangerousness, rather than the product of complex social, economic, educational, and enforcement variables. *Id.* at 50-51, 54. As a leading statistician claimed at the time, the data "'show[ed] without exception that the criminality of the negro exceeds that of any other race of any numerical importance in this country.'" *Id.* at 51 (quoting Frederick L. Hoffman, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO 228 (1896)). This statistics-based analysis lent apparent mathematical precision to prior views of black criminality. *But see id.* at 57 (noting limited contemporaneous cautions from white scholars regarding these conclusions); *id.* at 62-66 (same; black scholars Kelly Miller and W.E.B. Du Bois). By the 1920s, "[r]ace-relations writers had inscribed criminality onto nearly every aspect of black people's existence." *Id.* at 93.

These beliefs about black criminality mirrored and justified society-wide discrimination as Southern states returned fully to local white control following Reconstruction. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445–47 (1968) (Douglas, J., concurring) (listing a "brief sampling" of the many "badges of slavery" that persisted long after abolition). Even as states removed explicit discrimination from their laws, they managed to suppress civil rights of blacks through new laws aimed at maintaining white supremacy in spite of their facial neutrality. For instance, black voter registration and turnout plummeted as states passed new voting laws imposing prerequisites that blacks often could not meet or vesting discretion in

registrars who frequently used it to disenfranchise blacks. *See* Michael Klarman, FROM JIM CROW TO CIVIL RIGHTS 32 (2004) (hereafter Klarman) (statistics of drastic voting reductions in 1890s). In turn, black officeholders disappeared at all levels of government. *Id.* This disenfranchisement made exclusion of blacks from juries a simple step. *Id.* at 38-39. The discriminatory discretion vested in voter registrars was similarly reflected in the convict-leasing regimes some states enacted. Blacks were convicted of highly discretionary petty crimes, like vagrancy, riding freight cars without a ticket, or talking with white women, and sentenced to hard labor or leased to corporations until they could pay off court fees. *See* Douglas A. Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

At times even this Court's own opinions reflect the broad array of discriminatory laws enacted—and sometimes affirmed. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding statute requiring separate railroad accommodations); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding subjective Mississippi voting literacy test and grandfather clause effectively exempting illiterate whites); *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899) (upholding decision to close black high school); *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908) (upholding law prohibiting desegregated college).

Substantive criminal law again reflected this discrimination and strengthened the stereotype of blacks as dangerous. Many of the same crimes that

Southern states previously made capital only for blacks remained capital nearly one hundred years later. As late as 1954, rape, robbery, arson, and burglary remained capital offenses in many Southern states, even as the North abolished them. Traces of Slavery 101 (listing states).

While states technically no longer applied these statues by race, in practice death sentences "were imposed disproportionately on black defendants." *Id.* Between 1870 and 1950, 701 of the 771 people of identifiable race executed for rape in the South were black. *Id.* at 107. Thirty-one of the thirty-five people executed for robbery and eighteen of the twenty-one executed for burglary in the same period were black. *Id.* Even for murder, where disparities were smaller, blacks outnumbered whites 217 to 57 in Virginia and 301 to 135 in Texas. *Id.* In other words, while whites were still convicted for these offenses, blacks were disproportionately viewed as worthy of death. Such disparities, in turn, essentially communicated that rapists, robbers, burglars, and murderers were black, strengthening stereotypical beliefs.

Worse, the presumption of black guilt was so strong that blacks were often assumed guilty and executed with only the barest pretense of a trial. *Id.* at 106. For instance, a black man convicted of raping a white woman in Kentucky in 1906 was hanged only fifty minutes after the jury was sworn, while the same year a black defendant in Texas went from indictment to hanging in under four hours. *Id.*; *see also Moore v. Dempsey*, 261 U.S. 86, 89 (1923) (mob-dominated trial of five black murder defendants that "lasted about three-quarters of an hour" with a five-minute jury deliberation); *Powell v. Alabama*, 287

U.S. 45, 51 (1932) (Scottsboro Boys case; single-day trials for seven black youths accused of raping two white girls conducted under militia guard due to mob threats); *Brown v. Mississippi*, 297 U.S. 278, 279 (1936) (black murder defendants tortured into confession arraigned four days after the murder occurred, tried the following day, and found guilty on the next).

And many blacks accused of crimes never had even the farce of a trial. Lynchings in the late nineteenth and early twentieth century further strengthened the association of blacks as criminal. In the 1890s, lynching exploded across the South. *See, e.g.*, David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 793-94 (2005) (hereafter Garland). During that period, lynchings peaked at an average of 187.5 per year before dropping to an average of 92.5 in 1900-1909, 61.9 from 1910-1919, 46.2 in the first half of the 1920s, and 16.8 in the second half. Klarman at 118-19. In at least some states, known lynchings actually outnumbered executions. *See, e.g.*, Traces of Slavery 107 (229 executed in Kentucky between 1865 and 1940, while 353 lynchings occurred).

But the numbers alone do not tell the whole story. Lynchings often were highly public affairs involving large numbers of every-day citizens. Garland at 803. These public lynchings likely had many purposes, from vengeance to racial control to opposition to civil rights, *id.* at 819-28, but they were also a form of entertainment. *Id.* at 825 (noting contemporaneous references to "Lynching bees," "Negro barbecues, and "lynch carnivals"). Participants and observers at

public lynchings were photographed smiling and laughing with the tortured bodies of black victims. *See* James Allen et al., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000) (early twentieth century photographs and postcards of lynching victims); *see also, e.g., id.* at Plate 57 (smiling children observing lynch victim); *id.* at Plates 42-43 (front and back photographs of live, naked lynching victim standing on wagon before crowd, showing significant wounds from lashing); *id.* at Plate 44 (same victim hanged from tree, with blanket tied around loins). In some instances, individuals even sent greeting cards bearing images of lynchings through the U.S. mail to friends and family. *See, e.g., id.* at Plates 54-55.

And even when lynching was criticized, at least some argued that lynching was improper because it brought whites down to the same presumed level of criminality as blacks. Thus one journalist noted in 1905 that "[t]he man who joins a mob, by his very acts, puts himself on a level with the negro criminal: both have given way to brute passion." Condemnation of Blackness at 29 (citation omitted). Under this view, while lynching was an evil, the wrong was at least in part that "the white man becomes as savage as the negro." *Id.* Such perspectives illustrate the "deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation," *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013) (Sotomayor, J., statement respecting the denial of certiorari).

II. THE PSYCHOLOGICAL IMPACT OF STEREOTYPES OF "BLACK AS CRIMINAL"

Unfortunately, the racial baggage of the United States is embedded in the American psyche, where it continues to influence the ways people interpret their surroundings. As the National Black Law Students Association details in its *amicus* brief in this case, psychological research demonstrates that people today continue to equate blackness with criminality and dangerousness on a subconscious level. These views, particularly when triggered by racially-tinged suggestions, can have a dramatic impact on decision making, including jurors' views when making death penalty determinations.

A. The Impact of Unconscious Stereotypes in Decision Making

Research demonstrates that the stereotype of blacks as criminal so permeates the public mindset that approximately 70 percent of Americans harbor implicit racial bias against black Americans. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 11 tbl.2, 12 (2007). This is not to say that these Americans are explicitly racist; an individual may have completely different implicit associations and explicit attitudes about the same subject. *See, e.g.*, John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002).

Given the long history of the stereotype of blacks as criminal, it is not surprising that one of the strongest implicit racial biases is that between blackness and criminality, violence, aggression, and

danger. *See, e.g.*, Heather M. Kleider et al., *Looking Like A Criminal: Stereotypical Black Facial Features Promote Face Source Memory Error*, 40 MEMORY & COGNITION 1200 (2012); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

This Court has repeatedly recognized that unconscious, discriminatory stereotypes impact decision making. Just last year this Court noted the role that "covert and illicit stereotyping" might play in housing decisions. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). Similarly, *Price Waterhouse v. Hopkins* considered evidence of unconscious stereotyping and found it played a role in the defendant employer's decision not to promote the plaintiff. 490 U.S. 228 (1989). Members of this Court have also recognized the role unconscious stereotypes play in jury situations. Justice Breyer noted in *Miller-El v. Dretke*, which involved prosecutor discretion in striking jurors, that "[s]ubtle forms of bias are automatic, unconscious, and unintentional and escape notice, even the notice of those enacting the bias." 545 U.S. 231, 268 (2005) (citations omitted). And in *Georgia v. McCollum*, Justice O'Connor similarly observed that, "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

Lower courts have also recognized the role that unconscious stereotypes play in decision making. In

considering whether a warrantless stop of a person based on his "Hispanic appearance," was reasonable, the Ninth Circuit recognized that "racial stereotypes often infect our decision making processes only subconsciously." *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994). The Seventh Circuit likewise noted that "stereotyping and unconscious bias is not limited to one particular area of society... There is no reason to believe that a jury would be immune to those racial stereo-types in determining credibility or analyzing motives." *United States v. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005). Lower courts have also noted the role that unconscious biases can play in decisions regarding hiring, firing, promotions and pay in the employment arena. *See, e.g., Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999) ("Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias") (emphasis added); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1232 (9th Cir. 1984) (affirming lower court finding that company was responsible for maintaining "a two-tiered wage structure" based on race, despite the fact that "[t]he company did not consciously set out to establish" such a structure).

B. The Impact of Implicit Racial Bias on the Criminal Justice System

Implicit racial biases have direct, real-world consequences at every stage of the criminal justice system, including arrests, trial, and sentencing. *See* John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial*

Disparity in the Criminal Justice System, 51 AM. CRIM. L. REV. 689, 694 (2014); Joshua Correll et al., *The Police Officers' Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002). Most pertinently for the present case, numerous empirical studies have demonstrated the impact of implicit racial bias on the kinds of decisions that jurors make during trial and sentencing.

Stereotypes can affect what a juror remembers from trial during subsequent deliberations. For instance, in one experiment, researchers had participants read a story about a fight featuring either a black actor, a Native Hawaiian actor, or a white actor. Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319 (2010) (citing Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059 (2005)). Participants who read the story featuring a black American "remembered his aggressive actions better than [other] participants" and, in some instances, participants reading about a black actor "possessed false memories of the African American actor acting aggressively." *Id.* Furthermore, researchers have found that simply changing the skin tone of a perpetrator in a surveillance camera photo makes participants more likely to judge different pieces of evidence from a trial as indicative of guilt. *Id.* at 310.

These views carry through trial to criminal sentencing as well. In addition to demonstrating

that individuals are more likely to believe black defendants are guilty, researchers have found that implicit racial bias makes individuals believe blacks are more dangerous, aggressive, and unrepentant at sentencing. *See* Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005); *see also* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Irene V. Blaire et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004). When jurors face high-stakes decisions about defendants' fates in death penalty cases, they implicitly interpret stereotypically black features as cues to deathworthiness. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006).

C. Racial Priming As Trigger for Racial Stereotypes

As dangerous as implicit racial stereotypes may be on their own, studies also recognize that such stereotypes can be exacerbated through a psychological triggering phenomenon known as priming. Priming occurs when "subtle influences . . . increase the ease with which certain information comes to mind." Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 69 (2009).

Numerous experiments have shown that priming an individual with race-based stereotypes can significantly influence later decisions by that

individual. For instance, in one experiment, researchers subliminally exposed police officers and juvenile probation officers to either a set of words related to blackness (such as "graffiti," "pimp," "dreadlocks," "Oprah," "plantation," or "reggae") or a set of mostly neutral words (such as "baby," sunset," "funeral," "stress," "paralysis," or "laughter"). Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 489 n.5 (2004) (listing words used). The researchers then had the officers read two hypotheticals about either an incident involving shoplifting or an assault. No information regarding the offender's race was given. The officers were then asked to rate "the hypothetical offender on... expected recidivism, and deserved punishment." *Id.* at 487. Officers who had been primed with race-cued words "reported more negative trait ratings, greater culpability, and expected recidivism, and [ ] *endorsed harsher punishment* than did officers in the neutral condition." *Id.* at 504 (emphasis added); *see also* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 5 J. PERSONALITY & SOC. PSYCHOL. 5-18 (1989) (participants primed with words having stereotypic associations with African Americans more likely to judge an individual exhibiting ambiguous behavior as hostile than unprimed participants).

The specific method of priming appears to matter less than the fact that the prime is given. For instance, researchers found that participants who were primed by listening to rap music were more likely to later "rate[ ] a Black male's violent behavior as being more character-based" than participants

who were not primed by listening to rap music. UNDERSTANDING PREJUDICE AND DISCRIMINATION 27 (S. Plous, ed., 2003) (citing J.D. Johnson, Trawalter, & J.F. Dovidio, *Converging interracial consequences of exposure to violence rap music on stereotypical attributions of blacks*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 233 (2000)). Similarly, researchers have found that "[w]hite television viewers who watch a stereotyped comic portrayal of African Americans are later more likely to judge a Black defendant as guilty of assault." *Id.* (citing Thomas E. Ford, *Effects of Stereotypical Television Portrayals of African-Americans on Person Perception*, 60 SOC. PSYCHOL. Q., 266-75 (1997)).

In other words, while the nature of the prime can differ, the effect of priming individuals with stereotypes of blacks remains consistent. Individuals provided race-based cues concerning blacks are more likely to rely on stereotypes and judge blacks hostile, violent, and unintelligent.

III. EXPERT ENDORSEMENT OF STEREOTYPES EXACERBATES THE RISK OF IMPROPER EXERCISE OF JUROR DISCRETION

The risk of decision making based on priming with implicit racial stereotypes is exacerbated when an expert presents the prime in the discretionary context of jury sentencing. An expert's position of authority in telling jurors how to exercise their considerable discretion renders expert testimony particularly damning in one of the most important moments of jurors' lives—deciding whether a fellow human being is worthy of death.

A. Expert Testimony Based on Race Subverts Jury Deliberations

Racially discriminatory testimony dressed up as expert opinion can readily sway juror decision making. Jurors tend to defer automatically to expert opinion, with jury deliberations especially susceptible to corruption by racial biases.

Ever since Yale University psychologist Stanley Milgram famously showed that subjects will obey instructions from authority figures, even to the point of causing great pain to another person, social science research has repeatedly demonstrated that individuals have a persistent tendency to defer blindly to authority. *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 375–76 (1963). [2] Milgram

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[2] In Milgram's experiment, subjects were instructed to administer a series of increasingly high voltage electric shocks to a "learner" (in reality, an actor hired for the experiment) in an adjoining room. The "shocks" were administered at increments starting at 15 ("Slight Shock") and reaching 450 volts ("XXX"). Of the 40 subjects involved, none stopped prior to administering 300 volts ("Intense Shock"), and 26 "obeyed the orders of the experimenter to the end, proceeding to punish the [learner] until they reached the most potent shock available," two steps beyond the designation "Danger: Severe Shock." *See id.* at 375–76; *see also* Emilie A. Caspar et al., *Coercion Changes the Sense of Agency in the Human Brain*, 26 CURRENT BIOLOGY 585 (2016); Charles L. Sheridan & Richard G. King, Jr., *Obedience to*

concluded that obedience to authority is a "deeply ingrained behavior tendency, indeed, a prepotent impulse overriding training in ethics, sympathy, and moral conduct." *Id.* at 371.

Experts are such authority figures. As social psychologists John French and Bertram Raven influentially explained, "expert power" is an important "bas[i]s of social power" that endows those who possess it with disproportionate influence over others. John P. French & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER 150 (Dorwin Cartwright ed., 1959). "[E]xpert power" is based on the perception that someone "has some special knowledge or expertness," and it "results in primary social influence on [the person's] cognitive structure," which becomes "relatively dependent on [the expert]." *Id.* at 163, 164. In other words, when presented with the opinion of a perceived expert, individuals cease to think independently and instead rely on the expert to think for them. This insight is supported by multiple studies indicating that decisionmakers reflexively defer to expert advice.[3]

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Authority with an Authentic Victim, 80 Annual Convention, APA 165 (1972); Charles K. Hofling et al., *An Experimental Study of Nurse-Physician Relationships*, 143 J. NERVOUS & MENTAL DISEASE 171 (1966).

[3] *See, e.g.*, Silvia Bonaccio & Reeshad S. Dalal, *Advice Taking and Decision-Making: An Integrative Literature Review, and Implications for the*

Indeed, individuals rely on experts to the point that they shut down their own neural decision-making activity. *See, e.g.*, Jan B. Engelmann et al., *Expert Financial Advice Neurobiologically "Offloads" Financial Decision-Making under Risk*, PLOS ONE (Mar. 24, 2009), http://dx.doi.org/10.1371/journal.pone.0004957.

This tendency to defer to expert opinion is heightened when a "novice" decision-maker has limited guidance and wide discretion and is asked to make a difficult decision. *See, e.g.*, Berndt Brehmer & Roger Hagafors, *Use of Experts in Complex Decision Making: A Paradigm for the Study of Staff Work*, 38 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 181 (1986); Francesca Gino & Don A. Moore, *Effects of Task Difficulty on Use of Advice*, 20

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Organizational Sciences, 101 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 127 (2006) (summarizing the literature); Nigel Harvey & Ilan Fischer, *Taking Advice: Accepting Help, Improving Judgment, and Sharing Responsibility*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 117 (1997); Helmut Jungermann & Katrin Fischer, *Using Expertise and Experience for Giving and Taking Advice*, in THE ROUTINES OF DECISION MAKING 157 (Tilmann Betsch & Susanne Haberstroh eds., 2005); Janet A. Sniezek & Timothy Buckley, *Cueing and Cognitive Conflict in Judge-Advisor Decision Making*, 62 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 159 (1995).

J. BEHAV. DECISION MAKING 21 (2007). The jury room creates precisely this scenario. Juries generally have no special training for their task; they are given enormous discretion; and they are entrusted with making complex and difficult decisions. Capital sentencing juries in particular receive limited guidance while at the same time being required to make the hardest decision of all: between life and death.

In this context, expert testimony is a powerful influence. One key study, for example, found that "psychological expert testimony on the dangerousness of a criminal defendant," including a factor-based risk assessment such as that presented at the sentencing hearing in this case, "significantly influenced mock jurors' decisions on this issue." *See* Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL'Y & L. 267, 299–301 (2001). Expert testimony blurs the "descriptive/explanatory function of the expert with the evaluative/prescriptive function of the [jury]," increasing the risk that the jury will blindly rely on expert testimony and effectively "abdicate its responsibility to the expert." Mark D. Cunningham, & Thomas J. Reidy, *Don't Confuse Me With the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 37 (1999).

B. Juror Discretion in Capital Sentencing Aggravates Biased Expert Testimony

The impact of an expert priming a jury with racial stereotypes is further aggravated by the discretionary nature of jury decisions, especially in

capital sentencing decisions. Indeed, this Court has recognized that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986); *see also, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573.

By design, jury deliberations are not subject to judicial oversight or public scrutiny. For example, the law prohibits judges from forcing juries to reach a particular verdict, or forcing them to reach a verdict at all. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 462 (1978) (finding reversible error "solely because of the risk that the [jurors] believed the court was insisting on a dispositive verdict"); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977) ("The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."); *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J., dissenting) ("[A] judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function.").

Similarly, it is a "cardinal principle that the deliberations of the jury shall remain private and secret," *United States v. Olano*, 507 U.S. 725, 737 (1993) (internal quotation marks and citation omitted), and both federal and state rules of evidence bar testimony about juror deliberations when offered

to challenge the validity of a verdict. *E.g.*, *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014) (discussing origins of Fed. R. Evid. 606(b)); Ill. R. Evid. 606(b) (barring testimony about juror deliberations when offered to challenge verdict); Ohio R. Evid. 606(b) (same); Tex. R. Evid. 606(b) (same). This confidentiality preserves "full and frank discussion in the jury room, [and ensures] jurors' willingness to return an unpopular verdict"—in other words, it safeguards jurors' discretion to reach a decision free from scrutiny or interference. *Tanner v. United States*, 483 U.S. 107, 120-21 (1987)

Capital sentencing juries possess even greater discretion than guilt-phase juries. To be sure, this Court has mandated that juries must be given guidance when deciding whether to mete out a death sentence. *See Maynard v. Cartwright*, 486 U.S. 356, 362, (1988) ("Since *Furman* [*v. Georgia*, 408 U.S. 238 (1972)], our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). But the jury's discretion in determining whether to impose a death sentence remains very broad.[4]

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[4] Indeed, while recognizing the need of capital sentencing juries for some level of guidance, this Court has also held that the discretion of the capital sentencing jury is essential to the just administration of the death penalty. *See Lockett v. Ohio*, 438 U.S. 586, 597-98, 604 (1978) (discussing abandonment of mandatory death penalty scheme

In general, once a jury has found facts rendering a defendant death-eligible, their deliberations during the penalty-selection phase of sentencing are guided only loosely, usually by the court's direction to consider various factors. *See Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("To render a defendant eligible for the death penalty in a homicide case, . . . the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent)."); *California v. Ramos*, 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."). "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa*, 512 U.S. at 979. And selection-phase factors generally do not

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and holding that "the Eighth and Fourteenth Amendments require that the [capital] sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Woodson v. North Carolina*, 428 U.S. 280, 295, 304 (1976) (plurality op.) (noting capital jury's function of "maintain[ing] a link between contemporary community values and the penal system" and ensuring that capital defendants are treated "as uniquely individual human beings").

dictate any given answer to the ultimate question of whether a death-eligible defendant will receive a life sentence or be executed. *See Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) ("[I]n the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination."); *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (holding that it is constitutionally permissible for "the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute").

This freedom stands in striking contrast to the deliberations of ordinary juries, which are guided by carefully drawn instructions specifying what facts the jury must find to return a guilty verdict. *See Zant*, 462 U.S. at 899 (Rehnquist, J., concurring) (explaining that a guilt-phase jury "decides whether the defendant committed a specific set of defined acts with a particular mental state" and that the "elements [of the crime], each of which is necessary to the verdict of guilty, are specifically and carefully enumerated and defined in the . . . instructions to the jury"); *United States v. Park*, 421 U.S. 658, 674-75 (1975) (discussing the need to focus jury deliberations, through appropriate instructions, on the specified elements of the crime). Thus, while "confronted with evidence and argument on the issue of whether another should die, and . . . asked to decide that issue on behalf of the community," capital juries retain "significant discretion" and receive "only *partial* guidance as to how their judgment should be

exercised." *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985) (emphasis added).

IV. "EXPERT" QUIJANO IMPROPERLY PRIMED THE JURY THAT MR. BUCK WAS VIOLENT BECAUSE HE WAS BLACK

As demonstrated, many Americans labor under a historical and psychologically-based burden of perceived black criminality. In this case, Mr. Quijano's "expert" testimony reinforced those inaccurate stereotypes and validated the implicit racial biases the jury venire likely brought with them. Worse, rather than presenting a view of Mr. Buck as a complete individual, Mr. Quijano used his authoritative position as an expert to tell jurors that they should exercise their nearly-unlimited discretion to indulge a predisposition that Mr. Buck was a dangerous, violent criminal based on his race. The consequences of Mr. Quijano's testimony threaten our most basic notions of due process. *See Zant*, 462 U.S. at 885 (if "constitutionally impermissible" factors like race were relied upon by a capital sentencing jury, "due process of law would require that the jury's decision to impose death be set aside").

Mr. Quijano's testimony primed the jury to sentence Mr. Buck as a presumptively dangerous black criminal in three explicit ways. First, when Quijano testified on direct examination, he provided testimony more reminiscent of the 1890s than modern America that race was among the "statistical factors in deciding whether a person will or will not constitute a continued danger," and that Blacks and Hispanics are more likely to be dangerous. Sentencing Hr'g Tr. 111:1-4, May 6, 1997, *Buck v.*

Stephens, No. 4:04-cv-03965 (S.D. Tex.), ECF No. 5-114 at 4. Second, on cross-examination Mr. Quijano agreed with the prosecutor's question that "the race factor, black, increases the future dangerousness" of an individual "for various complicated reasons." *Id.* at 160:8-15, ECF No. 5-115, at 17. Third, and perhaps most significantly, the jury requested that Mr. Quijano's expert report be sent to the jury room for consideration. *See* Jury Requests, *Buck*, No. 4:04-cv-03965, ECF No. 5-9 at 4. The request for the report was the last of three notes sent to the court before the jury decided to sentence Buck to death. *Id.* In the final moments of their deliberation then, the jury requested and received a document analyzing future dangerousness with the phrase, "Race. Black. Increased probability. There is an over-representation of Blacks among the violent offenders." 3/8/97 Forensic Psychological Evaluation at 7, *Buck*, No. 4:04-cv-03965, ECF No. 5-118 at 24; *see also Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (Statement of Alito, J.) (quoting same).

If nothing more than subliminal priming words or rap music are enough to trigger judgment-altering racial stereotypes, Mr. Quijano's explicit and thrice-repeated assertion that blacks present an "[i]ncreased" risk of violence was a far worse prime triggering powerful racial stereotypes. Mr. Buck was entitled to have his dangerousness assessed on an individualized basis based on his personal attributes. Instead he received a death sentence tainted by four hundred years of racial stereotyping invoked by a witness who was supposed to testify on his behalf. *See also Saldano v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (en banc) (noting Texas' confession

of error before this Court in case where Mr. Quijano presented similar testimony on behalf of prosecution). The defense attorney's decision to rely on testimony explicitly prompting the jury's implicit racial biases was an extraordinary circumstance satisfying the requirements of Rule 60(b)(6).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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AUGUST 2016